United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

w/ affidavit

76-6037

To be argued by
THOMAS H. BELOTE

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-6037

OSCAR LONDONO,
Plaintiff-Appellant,

—v.—

MAURICE F. KILEY, New York District Director,
U.S. Immigration and Naturalization Service,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANT-APPELLEE

ROBERT B. FISKE, JR.,
United States Attorney for the Southern District of New York, Attorney for Defendant-Appellee.

THOMAS H. BELOTE,
MARY P. MAGUIRE,
Special Assistant United States Attorneys, Of Counsel.

TABLE OF CONTENTS

CASES CITED

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ISSUE PRESENTED

WHETHER THE DISTRICT COURT ERRED IN DENYING LONDONO'S MOTION FOR A PRELIMINARY INJUNCTION STAYING HIS DEPORTATION

STATEMENT OF THE CASE

This is an appeal from an order of the Honorable Inzer B. Wyatt, United States District Judge, dated February 6, 1976, denying plaintiff's motion for a preliminary injunction in which he sought to stay the

defendant from enforcing an outstanding order of deportation. In this appeal the alien claims that the defendant's decision to enforce his deportation was arbitrary, capricious and an abuse of discretion, and further contends that the District Court erred in denying the alien's motion for a preliminary injunction. Contrary to the alien's contention we submit that the administrative decision below was a proper exercise of discretion and, therefore, that the District Court correctly denied the alien's motion as being "totally without merit".

STATEMENT OF FACTS

The plaintiff-appellant Oscar Londono is a twenty-seven year old alien, a native and citizen of Colombia, who surreptiously entered the United States on or about August 8, 1975 at the international border near Tijuana, Mexico, without inspection by immigration officers as required under the Immigration and Nationality Act (the "Act"). In addition to being deportable, this alien appears amenable to prosecution for violation of 8 U.S.C.

§1325. The alien admitted to paying an identified person $200. in order to effect his entry (Exhibit A).* His wife and two minor children are currently residing in Colombia. The alien was apprehended by Service investigators on September 11, 1975 and was released on bond pending a hearing on his deportability.

On September 12, 1975 the Service commenced deportation proceedings with the issuance of an order to show cause and notice of hearing, charging that he was deportable from the United States pursuant to Section 241(a)(2) of the Act, 8 U.S.C. §1251(a)(2), as an alien who entered the United States without inspection (Exhibit B). During the deportation hearing before an Immigration Judge and while represented by counsel, the alien conceded his deportability. At the alien's request and upon his representation that he was ready, willing and able to depart from the United States, the Immigration Judge

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*All references to "exhibits" refer to those documents from the administrative file of the Immigration and Naturalization Service (the "Service") relating to the plaintiff-appellant which were attached to the defendant's affidavit in opposition to the order to show cause for a stay of deportation.

granted him the discretionary privilege of voluntary departure in lieu of enforced deportation provided that he depart on or before October 23, 1975. See Section 244(e) of the Act, 8 U.S.C. §1254(e), 8 C.F.R. §244.1. An alternative order of enforced deportation was entered in the event the alien failed to depart within the designated time as he had represented during the hearing. Londono waived his right to appeal the decision of the Immigration Judge and the decision became final. 8 C.F.R. §242.21 (Exhibit C).

Prior to the expiration of the alien's voluntary departure time the alien applied for and was granted an extension of time, to and including November 19, 1975, in which to effect his departure from the United States. This extension was granted on the basis that the alien had made arrangements to depart to Baranquilla, Colombia on that same date. An airline ticket issued on October 22, 1975 was submitted to the Service in support of this request for extended voluntary departure (Exhibit D). On December 4, 1975 and again

on January 8, 1976 the Service attempted to verify the alien's voluntary departure (Exhibits E and F). On January 23, 1976 the Service was notified that the airline had no record on its manifest indicating that the alien had voluntarily departed as represented. On that same date, and pursuant to the alternative order of enforced deportation contained in the decision of the Immigration Judge, a warrant of deportation was issued against the plaintiff alien (Exhibit G). On January 28, 1976 the alien was again apprehended by Service investigators and was given notice to surrender for deportation on February 2, 1976.

On January 30, 1976 the alien submitted to the Service a request for a stay of deportation and a motion to reopen deportation proceedings (Exhibit H) On that same date the alien was notified that his voluntary departure status would be reinstated if he surrendered as requested at the Service Facility in Brooklyn, New York and presented an airline ticket and requisite travel documents.

RELEVANT REGULATIONS

Title 8, Code of Federal Regulations (C.F.R.) §243.4
Stay of Deportation.

> Any request by an alien under a final administrative order of deportation for a stay of deportation, except a request for withholding of deportation pursuant to section 243(h) of the Act, shall be filed on Form I-246 with the district director having jurisdiction over the place where the alien is at the time of filing. The district director, in his discretion, may grant a stay of deportation for such time and under such conditions as he may deem appropriate. Written notice of the disposition of the alien's request shall be served upon him, but neither the making of the request nor the failure to receive notice of the decision thereon shall relieve or excuse the alien from presenting himself for deportation at the time and place designated for his deportation. Denial by the district director of a request for a stay is not appealable but such denial shall not preclude the Board from granting a stay in connection with a motion to reopen or a motion to reconsider as provided in Part 3 of this chapter, nor shall such denial preclude the special inquiry officer, in his discretion, from granting a stay in connection with, and pending his determination of, a motion to reopen or a motion to reconsider a case falling within his jurisdiction pursuant to §242.22 of this chapter, and also pending an appeal from such determination [262F.R. 12113, Dec. 19, 1961, as amended at 36 F.R. 318, Jan 9, 1971]

Title 8, Code of Federal Regulations (C.F.R.) §244.1 Application and §244.2 Extension of time to depart

Pursuant to Part 242 of this chapter and section 244 of the Act a special inquiry officer in his discretion may authorize the suspension of an alien's deportation; or, if the alien establishes that he is willing and has the immediate means with which to depart promptly from the United States, a special inquiry officer in his discretion may authorize the alien to depart voluntarily from the United States in lieu of deportation within such time as may be specified by the special inquiry officer when first authorizing voluntary departure, and under such conditions as the district director shall direct. An application for suspension of deportation shall be made on Form I-256A.

Authority to extend the time within which to depart voluntarily specified initially by a special inquiry officer or the Board is within the sole jurisdiction of the district director. A request by an alien for an extension of time within which to depart voluntarily shall be filed with the district director having jurisdiction over the alien's place of residence. Written notice of the district director's decision shall be served upon the alien, and no appeal may be taken therefrom.

ARGUMENT

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING THE MOTION FOR A PRELIMIN RY INJUNCTION

A preliminary injunction is an extraordinary equitable remedy, the application for which is addressed to the sound discretion of the trial court. Berrigan v. Norton, 451 F.2d 790, 793 (2d Cir. 1971). Reversal of the trial court's decision requires a showing of an abuse of that discretion. Cinematografica v. D-150, Inc., 366 F.2d 373, 374 (2d Cir. 1966). In order to establish his right to a preliminary injunction a party must demonstrate, among other things, a strong likelihood of ultimate success on the merits, and that he will be entitled to the relief he seeks. Brown v. Chote, 411 U.S. 452, 456 (1973). Thus, in this case where plaintiff-appellant is complaining of the failure to grant him discretionary relief he must demonstrate to the trial court that the defendant either abused or failed to exercise his discretion, and that he is entitled to the relief he seeks.

The record below reflects that this alien has been granted the discretionary privilege of voluntary departure on three separate occasions: Once by the Immigration Judge at the alien's deportation hearing, and twice by the Service's District Director On each of those occasions Londono failed to exercise the privilege.

The alien's immigration history since the finding of his deportability on September 23, 1975 reflects a purposeful pattern of delay in order to prolong his illegal sojourn in the United States. Londono's dilatory tactics in failing to obtain travel documents and depart voluntarily within the initial period set by the Immigration Judge is in and of itself a sufficient ground for the denial of additional discretionary relief. See Fan Wan Keung v. Immigration and Naturalization Service, 434 F.2d 301 (2d Cir. 1970). His subsequent failure to effect his voluntary departure after the presentation of an airline reservation for November 19, 1975 can only be construed as a bad faith effort and a further dilatory maneuver which has not been tolerated by this Court. See United

States ex rel. Lee Pao Fen v. Esperdy, 423 F.2d 6 (2d Cir. 1970); Lam Tat Sin v. Esperdy, 277 F. Supp. 482 (S.D.N.Y. 1964), aff'd, 334 F.2d 999 (2d Cir. 1964), cert. denied 379 U.S. 901 (1964).

Once a final order of deportation has been entered, the grant or denial of an application for a stay of deportation is committed entirely to the discretion of the District Director. 8 C.F.R. §243.4. In view of Londono's immigration history the District Court properly concluded that the defendant had not abused his discretion and that Londono had failed to demonstrate he was entitled to the relief he sought.

CONCLUSION

The appeal from the decision of the District Court should be dismissed.

Dated: New York, New York
May 3, 1976

Respectfully submitted

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Southern District of New York,
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Form 280 A-Affidavit of Service by Mail
Rev. 12/75

AFFIDAVIT OF MAILING

State of New York)
County of New York) ss

CA 76-6037

Pauline P. Troia,
deposes and says that s he is employed in the Office of the being duly sworn,
United States Attorney for the Southern District of New York.

That on the
3rd day of May, 19 76s he served ax copysof the 2
within govt's brief

by placing the same in a properly postpaid franked envelope
addressed:

Barry J. Oppenheim, Esq.,
11 Park Place,
NY NY 10007

And deponent further
says s he sealed the said envelope and placed the same in the
mail chute drop for mailing in the United States Courthouse Annex,
One St. Andrews Plaza, Borough of Manhattan, City of New York.

Pauline P. Troia

Sworn to before me this
3rd day of May, 19 76

Ralph I. Lee

RALPH I. LEE
Notary Public, State of New York
No. 41-2292838 Queens County
Term Expires March 30, 1977